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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 576

FRED R. REEVES, JOHN H. BRADLEY, WILLIAM L. DRISCOLL AND LYNWOOD C. FRITTER, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PRICE ADMINISTRATOR IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court is not officially reported and appears at pp. 7–8 of the Record. The opinion of the United States Court of Appeals for the District of Columbia (R. 24–26) is reported at 151 F. 2d 16.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1945 (R. 28). A petition for

rehearing was denied on August 6, 1946 (R. 31). The petition for a writ of certiorari was filed in this Court on November 1, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTES AND REGULATIONS INVOLVED

The case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Supp. IV, Sec. 901 et seq.), as amended by the Stabilization Extension Act of 1944 (58 Stat. 632, 50 U. S. C. App., Supp. IV, Sec. 921, et seq., and by the Stabilization Extension Act of 1945 (Pub. Law 108, 79th Cong. 1st Sess.); the Stabilization Act of 1942 (56 Stat. 765, U. S. C. App., Supp. IV, Sec. 961, et seq.), renewed by the Stabilization Extension Acts of 1944 and 1945, *supra;* the District of Columbia Code, 1940 Edition, Title 43, Secs. 103, 111, 122, and Title 47, Secs. 2331 (a), 2331 (b); Maximum Price Regulation No. 165 as amended—Services (7 F. R. 4734, 6428, 8 F. R. 10671); Revised Maximum Price Regulation No. 165 (9 F. R. 7439); Maximum Price Regulation No. 571 (10 F. R. 1150); Revised Supplementary Regulation No. 11 (7 F. R. 6426, 9 F. R. 3331 and 9 F. R. 5722). The pertinent provisions of the several statutes and regulations are discussed in the Argument and are set forth therein and in the Appendix, *infra,* pp. 18–36. For convenience of reference the Emergency Price Control Act of

1942, as amended, is hereinafter sometimes referred to as "the Act."

QUESTION PRESENTED

Whether maximum price regulations which in terms apply variously to charges for rentals of automotive vehicles or taxicabs, and which exempt charges for "any service * * * when performed by a person appropriately classified as a public utility and subject to regulation as such, maximum rates or charges for such service having been established, or otherwise regulated, by a federal, state or municipal authority having jurisdiction over such rates or charges," apply to charges for the rental of taxicabs to drivers in the District of Columbia, where by statute the term "public utility" includes "common carrier" and the latter includes persons "owning * * * any agency * * * for public use for the conveyance of persons * * * for hire," but where maximum rates for such taxicab rentals are not actually established or otherwise regulated by any governmental authority other than the Price Administrator.

STATEMENT

The Price Administrator brought these suits against petitioners in the District Court for the District of Columbia, alleging in substance that petitioners were the owners of taxicabs which they rent to cab drivers at a certain sum per day

or other convenient periods of time for the use by the cab drivers in their trade or business of transporting passengers for hire in the District of Columbia; that petitioners had violated the Emergency Price Control Act of 1942 by charging for the rental of such taxicabs rents or prices in excess of those prescribed by regulations promulgated pursuant to the Emergency Price Control Act and by failing to prepare and keep records and statements as required by such regulations. A judgment for statutory damages pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act as well as injunctions pursuant to the provisions of Section 205 (a) of the Act were prayed for. (R. 2, 11, 14, 19.) The petitioners moved to dismiss the complaints on the grounds that they failed to state claims upon which relief could be granted, and that petitioners' business, being that of a public utility and common carrier, was subject to the jurisdiction of the Public Utilities Commission of the District of Columbia and was expressly exempted from the provisions of the Emergency Price Control Act (R. 6, 13, 16, 21). The motions were overruled (R. 8), and thereupon, pursuant to leave granted, petitioners appealed to the Court of Appeals for the District of Columbia (R. 10). That court affirmed the orders overruling the motions to dismiss the complaints (R. 27–28).

No evidence was taken in the courts below, but the decisions of both the district court and the

court of appeals were based in part on facts of which those courts took judicial notice (R. 7, 24). These facts are as follows: The fares charged by the drivers to whom petitioners rent their taxicabs are regulated by the Public Utilities Commission of the District of Columbia. The rental or prices, however, which petitioners charge the cab drivers to whom they rent the taxicabs are not regulated. At one time the Public Utilities Commission issued an order providing for a hearing as to the reasonableness of the rentals charged by persons renting taxicabs to drivers whose charges are regulated by the Commission, but no action was ever taken as a result of this order (Appendix, *infra,* pp. 37–39).

ARGUMENT

The decision of the court below is clearly right and is not in conflict with the decision of any other appellate court. Moreover, it does not present any substantial question of law which has not already been decided by this Court.

1. The only question raised here [1] is whether or not regulations issued by the Price Administrator

[1] In the courts below petitioners made two contentions; first, that the regulations issued under the Act exempted the rental of taxicabs and, second, that if the regulations in fact applied to petitioners they were invalid under the provisions of Section 302 (c) of the Act which exempts common carriers and public utilities. In this Court petitioners, recognizing that only the Emergency Court of Appeals would have jurisdiction over the issue of validity, expressly concede (Pet. p. 9) that the validity of the regu-

under the provisions of the Act limit the charges which may be exacted by the petitioners for the use of taxicabs which they rent the drivers or operators. It is conceded that the operators of the taxicabs which the petitioners rent are public utilities; that the fares charged by such operators, as well as the services which they perform, are regulated by the Public Utilities Commission of the District of Columbia; and that by reason of express exemptions contained in the regulations issued by the Price Administrator under the Act such regulations do not apply to them. The rentals charged by petitioners, however, are not controlled or regulated by the Public Utilities Commission of the District of Columbia or any other regulatory officer or agency, and the regulations which have from time to time been issued by the Price Administrator under the Act expressly purport to apply to them.

The violations charged in the complaints were alleged to have occurred between August 1, 1943, and August 25, 1944. (R. 2, 11, 14, 19). During this period the applicable regulations were as follows:

a. *Maximum Price Regulation No. 165, as amended—Services,* issued June 23, 1942 (7 F. R. 4734), reprinted as amended August 13, 1942 (7 F. R. 6428). This regulation (as amended July

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lations cannot be attacked in this proceeding. See *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 418–419.

29, 1943, 8 F. R. 10671), provided insofar as here pertinent as follows:

§ 1499.101 *Prohibition against dealing in services above maximum prices.* On and after July 1, 1942, regardless of any contract or other obligation.

(a) *Sales.* No "person" shall "sell" or supply any of the "services" set forth in paragraph (c) of this section at a price higher than the maximum price permitted by this Maximum Price Regulation No. 165 as amended.

* * * * *

(c) *Services covered.* This Maximum Price Regulation No. 165 as amended shall apply to all rates and charges for the following services, except when such services are rendered as an employee:

* * * * *

(4) Automotive vehicles (including but not limited to automobiles, busses, motorcycles, semi-trailers, tractors, trailers and trucks)—lubrication, maintenance, painting, *rental.* * * *. [Italics supplied.]

* * * * *

SERVICES EXCEPTED FROM THIS REGULATION

§ 1499.107 *Services excepted from Maximum Price Regulation 165 as amended. The provisions of this regulation shall not apply to the services excepted from the General Maximum Price Regulation by Revised Supplementary Regulation No. 4*

> [Reference to R. S. R. No. 4 added at 7 F. R. 9972] *or Revised Supplementary Regulation No. 11,* or any amendments thereto, insofar and for such time as such services are excepted by those supplementary regulations. [Italics supplied.]

If the exception contained in Revised Supplementary Regulation No. 11[2] referred to in the provision italicized above is inapplicable, a question which we discuss at length *infra,* pp. 12–16, it is plain that petitioners' charges were subject to and limited by the "Services" regulation. Clearly the automobiles or taxicabs which petitioners rent to cab drivers are automotive vehicles and the services which petitioners perform constitute the rental of such automotive vehicles. If there were any doubt as to whether the Administrator intended that the sums charged as rental for taxicabs should be limited and regulated by the "Services" regulation, that doubt was resolved by an interpretation which he issued on September 1, 1942, less than one month after the issuance of the regulation. The interpretation reads as follows (OPA Service, p. 15:505):

> Taxicab rentals and storage services. Where a taxicab company owns cabs and leases them to drivers at a stipulated daily rental, the transaction is covered by MPR No. 165, as a rental of automobiles.

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[2] Revised Supplementary Regulation 4 related solely to sales to agencies of the United States and is wholly irrelevant.

This interpretation has never been revoked or rescinded. In fact, it was republished on November 15, 1944 in the official OPA Coordination Service ("Digest of Interpretations of Specific Price Schedules and Regulations") p. 22:1, and again as late as February, 1945 in the new OPA Service Desk Book "General" p. 50,401. Since the Administrator in issuing the interpretation was construing a regulation which he himself issued, the interpretation is controlling, unless clearly erroneous or clearly inconsistent with the regulation. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 417. The interpretation is manifestly not inconsistent with the regulation nor is it clearly erroneous. Indeed, the plain language of the regulation compels the construction which the Administrator has placed upon it.

b. *Revised Maximum Price Regulation 165* (9 F. R. 7439)[3]. This regulation replaced Maximum

[3] Revised Maximum Price Regulation 165 was superseded as of February 3, 1945, insofar as it pertained to the rental of commercial vehicles, by Maximum Price Regulation 571 (10 F. R. 1150). This regulation covers the rental of specific categories of automotive vehicles, including taxicabs. In issuing the regulation, the Administrator in the Statement of Considerations which he filed with the Division of the Federal Register concurrently with the promulgation of the regulation stated that he was merely making "a segregation of commercial vehicles" (Statement of Considerations, Appendix, pp. 34–36, *infra*). Maximum Price Regulation No. 571 was issued subsequent to the violations alleged in the complaint. Its provisions would be operative for the purposes of these proceedings if injunctions were to be issued against petitioners.

Price Regulation No. 165 as of August 1, 1944. In pertinent part it provided as follows:

> § 1. *Services covered.* This regulation covers the prices charged for all services except:[4]
>
> (a) Services exempted by Revised Supplementary Regulation No. 11.
>
> (b) Services sold to a government agency pursuant to (1) a secret contract or subcontract as provided in Supplementary Order No. 42, and (2) an emergency purchase subject to the conditions of § 4.3 (f) of Revised Supplementary Regulation No. 1.
>
> (c) Services specifically covered by other OPA regulations.
>
> (d) The following services which remain under the General Maximum Price Regulation:
>
> (1) Transportation services of contract carriers;
>
> (2) Storage, warehousing and terminal services, and services incident thereto;
>
> (3) The furnishing of electricity, gas, light, heat, power or water when the furnishing thereof is not subject to the requirements set forth in paragraph (c) of Revised Supplementary Regulation No. 11, § 1499.46.

The Statements of Considerations which the Administrator filed with the Division of the Federal

[4] By Amendment No. 3 (September 9, 1944, 9 F. R. 11173) the provision was changed to read: "This regulation covers all services previously covered by Maximum Price Regulation No. 165 as amended, Services. It also covers all other services except:"

Register in accordance with the requirements of Section 2 (a) of the Act when he issued the revised regulation (O. P. A. Service p. 15:146 B) stated in part as follows:

> Maximum Price Regulation No. 165 as amended—Services, has been revised and is issued as Revised Maximum Price Regulation No. 165 (Services). The new regulation maintains the substance of many of the provisions of the prior regulation. However, the language has been simplified and technical phraseology has been avoided wherever possible. The regulation has also been shortened.
>
> All services subject to price control except three types of services listed as remaining under the General Maximum Price Regulation and those services specifically covered by some other OPA regulation, are now covered by the revised Services regulation.

In other words "Revised Maximum Price Regulation 165" continued in force the provisions of the original "Services" regulation insofar as concerns the coverage of any business, prices or charges. Section 1499.101 (c) (4) of the original regulation, which expressly applied to "rental of "automotive vehicles", was adopted by reference in the "Revised" regulation. The latter regulation did not recapitulate the specific cate- (c) of the original regulation, but achieved the same coverage by its general provisions set forth gories of services set forth in Section 1499.101

at p. 10, *supra,* comprehending "all services" except those specifically exempted. Therefore, if petitioners' charges were subject to the original regulation they were also subject to and governed by the revised regulation, unless, of course, they were excepted by Revised Supplementary Regulation No. 11. Certainly none of the other exceptions in the regulations, as set forth above, are applicable.

c. *Revised Supplementary Regulation 11 (7 F. R. 6426, 9 F. R. 3331, 5722).* This is a revision of Supplementary Regulation No. 11 which was originally issued on June 16, 1942 (7 F. R. 4543) as one of a series of special regulations supplementing the provisions of the General Maximum Price Regulation (7 F. R. 3153), issued in April 1942. Its purpose was in part to construe the statutory exemptions from price control contained in section 302 (c) of the Act. When the successive "services" regulations involved in these suits (i. e. Maximum Price Regulation 165 and Revised Maximum Price Regulation 165) were issued, they contained clauses incorporating the exemptions created by Revised Supplementary Regulation No. 11 as seen above. The only provisions of Revised Supplementary Regulation 11 which need be considered are sub-paragraphs (91), (92) and (141) of paragraph (c). These sub-paragraphs read as follows:

> [The exemption shall apply to]
>
> (91) Transportation of commodities by rail, water, motor, pipe line, or other means of conveyance * * *
>
> * * * * *
>
> (92) Transportation of persons * * *
>
> * * * * *
>
> (141) Any service not excepted by other subparagraphs of this supplementary regulation when performed by a person appropriately classified as a public utility and subject to regulation as such, maximum rates or charges for such service having been established, or otherwise regulated, by a federal, state, or municipal authority having jurisdiction over such rates or charges.[5]

It is evident from the foregoing that the petitioners are not entitled to the exemption which they claim. Their business is obviously not "the transportion of commodities", nor is it "the transportation of persons"—although the lessee-drivers of the cabs are engaged in such transportation. It is instead the rental of equipment or automotive vehicles. Petitioners transport nothing and no one.

Nor can petitioners claim either (1) that they are "appropriately classified as a public utility

[5] Paragraph c (141) was added as a result of this Court's decision in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144. See Appendix, *infra*, pp. 24–34. As noted by the court below (R. 25, n. 5), the provision (9 F. R. 3331, 5722) conforms to, and in effect summarizes this Court's construction of the statutory exemption of "any common carrier or other public utility" contained in Section 302 (c) of the Act.

and subject to regulation as such * * * by a federal, state, or municipal authority having jurisdiction over [their] rates or charges"; or (2) that their "maximum rates or charges * * * [have] been established, or otherwise regulated" by any such regulatory body. Both of the foregoing requirements must be met by any person invoking the exemption established by sub-paragraph (141) of Revised Supplementary Regulation No. 11. Petitioners meet neither.

Petitioners' claim that, as owners of an "agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire" they possess the status of "common carrier" within the meaning of Title 43, Section 111, of the District of Columbia Code, is obviously not responsive to the explicit requirements of subparagraph (141). The Public Utilities Commission of the District of Columbia, to which petitioners point as the authorized regulatory body, has not classified petitioners in any manner whatever (not to say "appropriately") as a "public utility". Although taxicabs may have properly been classified as common carriers within the meaning of Section 111 (*Terminal Cab Co.* v. *Harding,* 43 App. D. C. 120, modified *sub nom. Terminal Cab Co.* v. *Kutz,* 241 U. S. 252), it does not follow that those who rent cars to drivers are a public utility. This Court has expressly held that one who rents cars or other transportation equipment to a common carrier is not a common

carrier or public utility. *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434; *Tank Car Corporation* v. *Terminal Co.,* 308 U. S. 422, 428. Petitioners cannot, therefore, claim to have been "*appropriately*" classified as a public utility within the meaning of the regulation.[6]

But even if it be conceded, *arguendo,* that petitioners are so "appropriately classified," they still fail of exemption under subparagraph (141) of Revised Supplementary Regulation No. 11 because their rates have not been "established or otherwise regulated" by an authorized regulatory body other than the OPA. As found by both courts below, and as shown by the documents set forth at pp. 36–39 of the Appendix, *infra,* the Pub-

[6] This is not to say that the Public Utilities Commission could not if it saw fit to do so regulate petitioners' charges. Congress could confer upon the Public Utilities Commission the power to regulate petitioners' charges. Whether Congress has done so is a question which lies wholly outside the issues of this proceeding. Since petitioners expressly concede that the validity of the regulations cannot be challenged in this proceeding, the only question presented for decision is whether the regulations, properly construed, purport to cover petitioners' charges. Should the Public Utilities Commission undertake to regulate petitioners' charges, the Administrator following a policy which he has consistently pursued since the decision of this Court in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, would abandon all attempts to regulate petitioners' charges, without undertaking to pass on the question whether the Commission's action was within the scope of its statutory powers, and regardless of whether the Emergency Price Control Act, properly construed and applied to this situation, would require such a withdrawal of control.

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lic Utilities Commission of the District of Columbia has never regulated the charges or rentals at which taxicabs may be rented to drivers (R. 7, 25). Petitioners do not assert the contrary, but only that the Commission has undertaken to investigate the subject.

The regulations, therefore, expressly purport to apply to the charges made by petitioners, and petitioners are not entitled to the exemption which they claim. The courts below were right in so holding.

2. The decision of the court below is clearly not in conflict with the decision of this Court in *Terminal Cab Co.* v. *Kutz,* 241 U. S. 252. That case merely held that a person who operates a taxicab and transports or carries passengers for hire is a public utility. No one questions this. But petitioners do not operate taxicabs, nor do they carry or transport passengers or property. The decision on which petitioners rely, therefore, has no bearing on any of the issues in this proceeding.

3. Nor is the decision below in conflict with the decision of this Court in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, which came from the Emergency Court of Appeals and which did not involve the interpretation but the validity of a regulation fixing the charges for warehousing services. The Court below observed that subparagraph (141) of Revised Supplementary Regulation No. 11 "cor-

rectly applies the standards laid down for the Administrator in the *Davies* case." (R. 25, n. 5.) See the Statements of Considerations for Amendments 45 and 50 to Revised Supplementary Regulation No. 11 (Appendix, *infra*, pp. 24–34).[7]

CONCLUSION

It is respectfully submitted that no reason exists which would warrant granting certiorari in these cases, and that the petition should be denied.

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Director, Litigation Division,
ABRAHAM GLASSER,
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Office of Price Administration.

DECEMBER, 1945.

[7] The court below also noted that petitioners did not there rely on the exemptions established by subparagraph (141). The Administrator drew the Court's attention to these exemption provisions in the interests of a full presentation and in order to eliminate any question of a possible exemption for petitioners under the several regulatory provisions sought to be applied to petitioners' business.

APPENDIX

1. *The Emergency Price Control Act of 1942* (56 Stat. 23, 50 U. S. C. App., Supp. IV, Sec. 901 et seq.), as amended by the *Stabilization Extension Act of 1944* (58 Stat. 632, 50 U. S. C., App., Supp. IV, Sec. 921) and by the *Stabilization Extension Act of 1945* (Pub. Law 108, 79th Cong., 1st Sess.)

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the

appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * * *

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. * * *